No. 70

In the Supreme Court of the United States

OCTOBER TERM, 1939

AMERICAN FEDERATION OF LABOR, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AND PACIFIC COAST DISTRICT INTERNATIONAL LONGSHOREMEN'S ASSOCIATION No. 38, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court below (R. 69–75) is reported in 103 F. (2d) 933. The decision and certification of the National Labor Relations Board (R. 6–58) are reported in 7 N. L. R. B. 1002.

JURISDICTION

The decree below was entered on February 27, 1939 (R. 75). The petition for certiorari was filed on May 26, 1939. The jurisdiction of this Court

rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether a certification issued by the National Labor Relations Board under Section 9 (c) of the National Labor Relations Act that a particular labor organization is the collective bargaining representative of the employees in a designated unit is reviewable under Section 10 (f) of the Act.

2. If the certification is held to be reviewable, the Court may also care to decide whether the Act authorizes the Board to decide that a unit consisting of the employees of members of certain employers' associations is appropriate for purposes of collective bargaining.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (c. 372, 49 Stat. 449, 29 U. S. C. Supp. IV, Sec. 151 *et seq.*) are set forth in the Appendix.

STATEMENT

On January 19, 1938, the International Longshoremen's and Warehousemen's Union, District No. 1 (hereinafter called the I. L. W. U.), affiliated with the Congress of Industrial Organizations (C. I. O.), filed with the Regional Director of the National Labor Relations Board in San Francisco a petition alleging that a question affecting com-

merce had arisen concerning the representation of the longshoremen on the Pacific Coast, and requesting the Board, pursuant to Section 9 (c) of the Act, to investigate the controversy and certify the names of the representatives designated by the longshoremen (R. 7–8). On January 29, 1938, the Board, pursuant to its Rules and Regulations, ordered that the Regional Director conduct an investigation and provide for appropriate hearings pursuant to Section 9 (c) of the Act, and that the proceeding be consolidated for purposes of hearing with two similar proceedings [1] initiated by locals of the I. L. W. U. in regard to the representation of the longshoremen in certain ports on the Pacific Coast (R. 8).

Thereafter, commencing February 15, 1938, and ending March 19, 1938, pursuant to notice, hearings were held before a trial examiner in Los Angeles and San Pedro, California; Seattle, Washington; and Portland, Oregon (R. 8–9). Petitioners herein, the I. L. W. U., the Board, and certain employers' associations and the members thereof, were represented by counsel and participated in the hearings (R. 8–9). At the hearings petitioners objected to the jurisdiction of the Board on the grounds that a contract between the employers and the petitioner, Pacific Coast District International

[1] The petition in one of these proceedings was withdrawn on February 4, 1938, and the proceeding was severed (R. 8).

Longshoremen's Association, No. 38 (hereinafter called the I. L. A.), deprived the Board of jurisdiction and that the Board was without power to find that a unit embracing more employees than those of an individual employer was appropriate for purposes of collective bargaining (R. 9). The Trial Examiner overruled these objections (R. 9). At the close of the hearings the trial examiner apprised the parties of their right to submit briefs to the Board, and on April 30, 1938, a brief was filed with the Board on behalf of the employers' associations and members thereof (R. 10). Thereafter, on June 20, 1938, the Board rendered its decision and certification (R. 7–58).

The Board found, in substance, as follows: From 1909 until June 1937 the organized longshoremen on the Pacific Coast were members of the I. L. A., affiliated with the American Federation of Labor (A. F. of L.) (R. 11).[2] Early in 1934 a convention of I. L. A. locals formulated certain demands upon the employers, including a demand that there be one coast-wide agreement, instead of separate port agreements, covering the longshoremen (R. 11–12). On May 9, 1934, after the demand for a coast-wide

[2] Petitioner's statement (Br. 3) that the I. L. A. had "for many years prior to the decision of the Board" represented "thousands" of Pacific Coast longshoremen is misleading in that in June 1937 a large majority of the members of the I. L. A. voted to change their affiliation and since that time have been represented by the I. L. W. U. (See *infra*, p. 6.)

agreement had been reiterated, all the longshoremen on the Pacific Coast went out on strike (R. 12). The strike was settled by an agreement for arbitration (R. 12–13), and in October 1934 an arbitration award was made which consisted of a series of agreements between the I. L. A. and the associations of employers covering basic wages and hours, and providing for the establishment of jointly operated hiring halls (R. 13).

The award was renewed in 1935 pursuant to an automatic renewal clause (R. 13). In 1936 both parties gave notice of a desire to modify the terms of the award and on February 4, 1937, the award was followed by a nominal amendment consisting of an agreement between the I. L. A. and the Coast Committee for the Shipowners, which had been set up by the employers' associations to act on their behalf (R. 13–14). Under this coast-wide agreement, preference in employment was to be given to members of the I. L. A. and the hiring halls in each port were to be maintained and operated by labor relations committees, composed of representatives of the longshoremen and of the employers' associations (R. 14). The committees, in addition, were to adjudicate all grievances relating to working agreements and discharges (R. 14). The agreement also provided for further negotiations with respect to certain rates of pay and maximum loads, and in April 1937 these negotiations resulted in two further coast-wide contracts (R. 14). Several

locals of the I. L. A. disapproved these contracts, but they were bound by the majority vote (R. 14).

In June 1937 a large majority of the longshoremen and other members of the I. L. A. voted to affiliate with the C. I. O. (R. 14–16). Thereafter, the I. L. W. U. was chartered by the C. I. O. (R. 17). All the I. L. A. locals, with the exception of four in four ports in the Puget Sound area, applied for charters from the I. L. W. U. (R. 18). At the time of the Board's decision, there were about 10,575 Pacific Coast longshoremen in the I. L. W. U., and only about 904 in the locals which remained with the I. L. A. (R. 18).

In July 1937 the agreement of February 4, 1937, was continued for another year by the I. L. W. U. and the Waterfront Employers Association of the Pacific Coast (R. 17), which had been authorized by the regional employers' associations to act in their behalf (R. 18–24). The employers, through the associations of which they were members and by whose collective bargaining contracts they were bound so long as they remained members (R. 22), acquiesced and joined with the I. L. W. U. in executing the agreement, except in the four Puget Sound Ports which had voted against affiliation with the C. I. O. (I. L. W. U.), and gave preference of employment to I. L. W. U. members (R. 30–31). However, both the employers and the associations refused to give formal recognition to the I. L. W. U. (R. 31–32).

The Board concluded that a question affecting commerce had arisen concerning representation (R. 44). In view of the coast-wide character of the organization and collective bargaining of the employers and longshoremen since 1934, and of the facts that the individual employers functioned almost entirely through their associations in dealing with the longshoremen (R. 18–25), that wages, hours, methods of hiring and of settling grievances, and other terms and conditions of employment were uniform on the Pacific Coast (R. 27–28), and that the history of bargaining by the longshoremen showed that they desired a coast-wide unit and that such a unit would best insure to them the full benefit of their rights under the Act (R. 26–27), the Board further concluded that all Pacific Coast longshoremen who worked for the members of the employers' associations constituted the appropriate unit for purposes of collective bargaining (R. 44–45). The Board also held that the Act authorized it to decide that such a unit was appropriate (R. 28–29), and that, as shown by signed cards introduced into evidence at the hearings, the I. L. W. U. had been designated by 9,557 of the total 12,860 longshoremen in the unit as their representative and was therefore the exclusive representative of the longshoremen in the unit (R. 44). Accordingly, pursuant to Section 9 (c), the Board issued its certification that the I. L. W. U.

had been so designated and was the exclusive representative[3] (R. 45).

On August 15, 1938, petitioners filed objections and exceptions to the certification, together with a motion for rehearing (R. 59–61). On August 27, 1938, the Board overruled the objections and exceptions, and denied the motion (R. 61–62).

On September 29, 1938, petitioners, purportedly pursuant to Section 10 (f) of the Act, filed in the

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[3] Petitioners' statement (Br. 3) that the Board certified the I. L. W. U. as the exclusive representative of "all employees of all longshore employers" in Pacific Coast ports is inaccurate.

The certification is as follows:

"By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 8, of National Labor Relations Board Rules and Regulations—Series 1, as amended,

"IT IS HEREBY CERTIFIED that International Longshoremen's and Warehousemen's Union, District No. 1, has been designated and selected by a majority of the workers *who do longshore work* in the Pacific Coast ports of the United States for the companies *which are members* of Waterfront Employers of Seattle, Waterfront Employers of Portland, Waterfront Employers' Association of San Francisco, Waterfront Employers' Association of Southern California, and Shipowners' Association of the Pacific Coast, as their representative for the purposes of collective bargaining, and that, pursuant to the provisions of Section 9 (a) of the Act, International Longshoremen's and Warehousemen's Union, District No. 1, is the exclusive representative of all such workers for the purposes of collective bargaining, in respect to rates of pay, wages, hours of employment, and other conditions of employment." (Italics supplied.)

court below their petition to review and set aside the Board's certification (R. 1–5). On October 22, 1938, the Board filed a motion to dismiss the petition on the ground that the court was without jurisdiction to review the certification (R. 64–68). After argument of the motion to dismiss (R. 68), the court, on February 27, 1939, rendered its decision dismissing the petition on the ground that the certification was not an order and hence was not reviewable under the Act[1] (R. 69–75).

After the decision of this Court in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, petitioners applied to the court below for leave to file a petition for rehearing, but the application was denied on the ground that the term of court had expired (R. 75–76). Thereupon petitioners filed their petition for writ of certiorari, which was granted on October 9, 1939.

SUMMARY OF ARGUMENT

I

Petitioners contend that the court below had jurisdiction to review the Board's certification

[1] The opinion of the court below suggests, we think erroneously (see *infra*, pp. 32–38), that petitioners might obtain relief in an independent suit in equity commenced in a district court. On March 29, 1939, petitioners filed suit in the District Court for the District of Columbia for a mandatory injunction to compel withdrawal of the certification. *American Federation of Labor* v. *Madden*, civil action No. 2214. By stipulation of the parties this suit is being continued pending final disposition of the instant case.

under the provision of Section 10 (f) of the Act that "any person aggrieved by a final order of the Board * * * may obtain a review of such order * * * in the Court of Appeals of the District of Columbia. * * *" The holding of the court below overruling this contention is in accord with the decision of the Circuit Court of Appeals for the Third Circuit in *United Employees Association* v. *National Labor Relations Board*, 96 F. 2d 875, and with the plain meaning of the Act. As shown in our brief in *National Labor Relations Board* v. *International Brotherhood of Electrical Workers*, No. 253, this Term (set for argument with the instant case), Section 10 (f) applies only to the review of final orders entered in unfair labor practice cases under Section 10, and Section 9 (d) was affirmatively intended by Congress to preclude a review of representation proceedings under Section 9 except in the single situation when an order under Section 10 is based upon facts certified under Section 9.

A. That Section 10 (f) is limited to the review of orders issued by the Board under Section 10 appears from the separate headings and distinct subject matters of Sections 9 and 10, respectively, from the position of Section 10 (f) as an integral part of Section 10, from its express terms, especially its references to "order," "the unfair labor practice in question," and "the pleading," and from the absence of any mention in it of facts certified or certifications made under Section 9. In the instant

case, there is no order, no unfair labor practice, and no complaint. Even assuming that the Board's certification constitutes an order in the general sense of the term, it is not an "order" within the meaning of Section 10 (f). The only "order" which the Act authorizes the Board to make is an order issued pursuant to Section 10 (c). In Section 9 (d), where alone in the statute representation and unfair labor practice proceedings are mentioned in the same section, Congress drew a clear distinction between "facts certified" or "certification" under Section 9 and "order" under Section 10.

B. The Board's certification is not an order even in a general sense. The decision of the court below was put upon this ground. The Circuit Court of Appeals for the Third Circuit, in *United Employees Association* v. *National Labor Relations Board*, 96 F. (2d) 875, 876, likewise so held. These decisions are in accord with those of this Court in analogous cases (*Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 562; *Shannahan* v. *United States*, 303 U. S. 596, 599; *United States* v. *Atlanta, B. & C. R. Co.*, 282 U. S. 522, 527–528; *United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299, 309–310) and do not conflict with but are supported by the decision in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125. In the *Virginian Ry.* case, *supra*, the court declared that a certification of bargaining representatives by the National Mediation Board was not an order.

Proceedings under Section 9 (c) are investigatory in character and the Board's certification fulfilled merely an advisory function. Cf. *Shannahan* v. *United States, supra.* The certification had no legal effect upon the rights of the employers or employees or labor organizations involved. The Act imposes duties only upon employers (Section 8) and if the employers herein desired not to bargain with the certified representative, they could be compelled to do so only by a proceeding under Section 10 and no penalty could be imposed. In any such proceeding, there would be a hearing (Section 10 (b)) with opportunity for interested persons to intervene and to secure a judicial review if they were aggrieved by a final order of the Board, and the Board's findings in the certification proceeding would not be *res judicata.*

The decision in the *Rochester* case, *supra,* is clearly inapplicable. The determination of the commission there reviewed "necessarily and immediately carried direction of obedience to previously formulated mandatory orders" (307 U. S. at 144). No previous order had been made by the Board in this case, and it is governed by the principle of the decision in *Shannahan* v. *United States,* 303 U. S. 596.

C. Section 9 (d) of the Act in providing for a review of certifications only in connection with review of orders in unfair labor practice cases under

Section 10 was affirmatively intended by Congress to preclude any other review of certifications. This interpretation of Section 9 (d) is shown to be correct by the legislative history. S. Rept. No. 573, 74th Cong., 1st Sess., p. 15; H. Rept. No. 1147, 74th Cong., 1st Sess., p. 23; 79 Cong. Rec. 7658. Petitioners' contention that Congress intended Section 9 (d) to prohibit review only of representation proceedings prior to the holding of elections is inconsistent with the desire of Congress to avoid the delays which would be occasioned by any resort to the courts in representation proceedings. The same is true of their contention that Section 9 (d) was intended to be applicable primarily to employers and that Congress did not intend to limit appeals by labor organizations. Whether recent developments in the labor movement indicate that certifications should be reviewable by labor organizations, and whether the advantages of an amendment to achieve that purpose outweigh the disadvantages, are questions for Congress. The American Federation of Labor has proposed such an amendment (S. 1000, 76th Cong., 1st Sess.).

D. The foregoing interpretations of Sections 10 (f) and 9 (d) raise no substantial question of constitutionality. Even if it were assumed that Congress could not validly preclude all judicial review of certifications, Congress plainly was not required by the Constitution to confer jurisdiction

upon the court below or any other particular tribunal. Cf. *Shannahan* v. *United States*, 303 U. S. 596, and *Shields* v. *Utah Idaho Cent. R. Co.*, 305 U. S. 177. Thus the only possible question of constitutionality in this case arises from our interpretation of Section 9 (d) as precluding review.

The Board's certification did not forbid or compel any action, but even if it were assumed to have had an adverse legal effect upon rights of petitioners, the Fifth Amendment would not require that there be opportunity for judicial review. (Cases cited, *infra*, p. 40.) Petitioners' alleged right to represent the longshoremen in particular units in collective bargaining is not a constitutional right. Cf. *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515; *Blankenship* v. *Kurfman*, 96 F. (2d) 450, 454 (C. C. A. 7th).

Petitioners further contend that if Congress precluded review of certifications it unconstitutionally delegated judicial power to the Board. Section 9 (d) provides an opportunity for review whenever the Board issues an order based upon facts certified, and in the absence of such an order the Board's certification clearly could be made nonreviewable. See *Shields* v. *Utah Idaho Cent. R. Co.*, 305 U. S. 177, 180; *Pennsylvania Railroad Co.* v. *Labor Board*, 261 U. S. 72.

II

If the Act is held to grant jurisdiction to the court below to review the Board's certification, the Court may consider the merits, and, if it does so, it should affirm the certification. Petitioners have at no time challenged the validity of the Board's findings of fact and their petition for review goes solely to the question whether the Act empowers the Board to decide that a multiple-employer unit is appropriate for purposes of collective bargaining.

The Board's power under Section 9 (b) to determine that an "employer unit" is appropriate, taken in conjunction with the statutory definitions contained in Sections 2 (2) and (1), expressly authorizes it to decide upon units larger than the individual employer. *National Labor Relations Board* v. *Lund*, 103 F. (2d) 815 (C. C. A. 8). Moreover, the Board's power is supported in the instant case by the provisions of Section 9 (b) that the designated unit shall insure to employees the full benefit of their right to self-organization and shall effectuate the policies of the Act. To construe the Act to prohibit the Board from deciding that multiple-employer units are appropriate might seriously endanger commerce in many important industries, such as the coal, clothing, and maritime industries, in which collective agreements commonly are made between labor organizations and

groups or associations of employers on behalf of their members.

The Board's decision is supported also by the legislative history. An amendment of the House of Representatives which added to Section 9 (b) a proviso designed to limit the Board to units consisting of the employees of individual employers was stricken in conference and was not adopted by Congress.

Impartial studies show that there are many advantages which may be gained from bargaining collectively on a scale broader than the single employer. Multiple-employer units are especially appropriate where, as in the instant case, the employers bargain through associations, and where the employees may work for one employer one day and another the next. Labor organizations affiliated with the American Federation of Labor, a petitioner herein, have urged the Board to decide that such units were appropriate (*Matter of F. E. Booth & Co.*, 10 N. L. R. B. 1491; *Matter of Hyman-Michaels Co.*, 11 N. L. R. B. 796), and in 1934 the I. L. A., another petitioner herein, called a strike partly for the purposes of securing a coast-wide contract (R. 12). Petitioners' contention that the Board's discretion might "run riot," if the Board had power to decide in favor of multiple-employer units, hardly needs answer and is, in any event, contradicted by the Board's decisions thus far and by the principles which the Board has followed.

ARGUMENT

I

THE COURT BELOW HAD NO JURISDICTION TO REVIEW THE BOARD'S CERTIFICATION

Petitioners contend that the court below had jurisdiction under Section 10 (f) of the Act to review the Board's certification. They urge that the language of Section 10 (f) is sufficiently broad to permit a review of any final order, whether made in an investigation proceeding under Section 9 or in an unfair labor practice case under Section 10 (Br. 16–17); that the Board's certification is a final order (Br. 34–49); that Section 9 (d) does not preclude review herein (Br. 22–23, 20); and that, if the Act were construed not to provide for review, its constitutionality would be endangered (Br. 24–29).

The holding of the court below that it was without jurisdiction to review the certification is in accord with the decision of the Circuit Court of Appeals for the Third Circuit in *United Employees Association* v. *National Labor Relations Board*, 96 F. (2d) 875. See also *Wallach's, Inc.*, v. *Boland*, 277 N. Y. 345.

In our brief (pp. 15–23) in *National Labor Relations Board* v. *International Brotherhood of Electrical Workers*, No. 253, this Term (set for argument with the instant case), we demonstrate that Section 10 (f) applies only to the review of final orders entered in unfair labor practice cases under

Section 10; also that Section 9 (d), in providing for review of Board certifications under Section 9 only when an order under Section 10 is based upon "facts certified" under Section 9, was affirmatively intended by Congress to preclude any other review of investigation proceedings conducted under Section 9. Since the instant case involves these same questions, we respectfully refer the Court to our brief in that case to supplement the following answers to the contentions of the petitioners herein.

A. SECTION 10 (F) APPLIES ONLY TO THE REVIEW OF ORDERS ISSUED IN UNFAIR LABOR PRACTICE CASES UNDER SECTION 10

The absence of jurisdiction under Section 10 (f) in the instant case, as in the *International Brotherhood* case, will appear very plainly from a summary of the provisions of Sections 9 and 10. The provisions of each of these sections form a coherent whole distinct from the other.

Section 9 deals with and is headed "REPRESENTATIVES AND ELECTIONS." Subsection (a) declares that representatives designated for collective bargaining by a majority of the employees in a unit appropriate for that purpose shall be the exclusive representatives of all the employees in the unit. Subsection (b) directs the Board to determine the appropriate unit in accordance with certain standards hereinafter discussed (*infra*, pp. 43–45). Subsection (c) provides that, when a question affecting commerce arises concerning the representation of

employees, the Board may investigate (in which event it must provide for a hearing) and "certify" the name of the representative designated, and that it may take a secret ballot of employees or utilize any other suitable method to ascertain the representative. Subsection (d) provides that when "an order" of the Board in an unfair practice case under Section 10 is based upon "facts certified" in a representation investigation under Section 9, and enforcement or review of "such order" is sought pursuant to Section 10 (e) or (f), the decree of the court enforcing, modifying, or setting aside "the order" shall be entered upon a transcript including the "certification" and record of the investigation under Section 9. Thus, Section 9 authorizes the Board to certify the names of representatives but provides for a review only where the "facts certified" have a bearing upon the validity of "an order" issued in, and before the court for review in, an unfair labor practice case under Section 10. We show hereinafter (*infra*, pp. 31–38) that this provision for review of representation proceedings was intended to be exclusive.

Any contention that Section 10 (f) adds additional instances in which review of certifications may be had is met at the outset by the fact that Section 10 deals solely with and is headed "PREVENTION OF UNFAIR LABOR PRACTICES." Nowhere does it mention investigation proceedings or certifications under Section 9. Subsection (a) empowers the

Board to prevent any person from engaging in any unfair labor practice [listed in Section 8] affecting commerce. Subsection (b) provides that when a person is charged with engaging in any such unfair labor practice the Board may issue "a complaint stating the charges" and may hold a hearing, and that the person named in the complaint has the right to file "an answer." Subsection (c) directs the Board, if upon the testimony it is of the opinion that there has been any unfair labor practice, to state its findings of fact, and to issue "an order" to cease and desist and to take appropriate affirmative action; if it is of the opinion that there has been no unfair labor practice, it is directed to issue "an order" dismissing the complaint. Subsection (d) reserves to the Board authority to modify or set aside its findings or order until a transcript of the record shall have been filed in a court.

Subsection (e) permits the Board to petition any circuit court of appeals (and the Court of Appeals for the District of Columbia) in any circuit "wherein the unfair labor practice in question occurred or wherein such person resides or transacts business" for the enforcement of "such order," the court to obtain jurisdiction upon the filing of a transcript of the complete record, "including the pleadings and testimony upon which such order was entered" and the "order of the Board." The court is granted power to enter a de-

cree enforcing, modifying, or setting aside "the order" of the Board.

This brings us to subsection (f), which provides:

> (f) Any person aggrieved by a *final order* of the Board granting or denying in whole or in part the relief sought may obtain a review of *such order* in any circuit court of appeals of the United States in the circuit wherein *the unfair labor practice in question* was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the *order* of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including *the pleading* and testimony upon which *the order* complained of was entered and the findings and *order* of the Board. Upon such filing, *the court shall proceed in the same manner as in the case of an application by the Board under subsection* (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the *order* of the Board; and the findings of the Board as to the facts,

> if supported by evidence, shall in like manner be conclusive. [Italics supplied.]

Clearly the extent of this paragraph is simply to afford persons[5] aggrieved by final orders issued by the Board under Section 10 (c) the same right to have such orders reviewed and set aside as the Board is given by subsection (e) to have them enforced. See *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, 369.

Petitioners, while admitting (Br. 18) that an investigation proceeding under Section 9 such as that involved here is of "an entirely different nature" from an unfair labor practice case under Section 10, nevertheless contend that the language "Any person aggrieved by a final order . . . may obtain a review . . ." is sufficiently broad to grant a review of the Board's certification. But this argument, even apart from the fact that the Board's certification was not an order (*infra*, pp. 24–31), ignores the context and other terms of the paragraph, as well as the excluding provisions of Section 9 (d). When these are considered, it becomes clear that even if the certification were assumed to constitute a final order in the ordinary sense, it was not an order within the meaning of Section 10 (e) or (f)—the "distinctive formulation of the conditions under which resort

[5] Contrary to the apparent belief of petitioners (Br. 16), we do not dispute that a labor organization may be a person aggrieved and thus be entitled to a review of an order issued under Section 10 (c).

to the courts may be made" under the Act. See *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156, 159. See also *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 132.

Section 10 (f) applies only to the review of orders entered in proceedings brought to prevent unfair labor practices, and not to the review of investigation proceedings (except as provided for by Section 9 (d)). Any other interpretation would be inconsistent with the separate title and subject matter of Section 10, with the position of subsection (f) as an integral part of Section 10, with its express terms, especially those which we have italicized, and with the meaning of Section 9 (d) (*infra*, pp. 31–38).

The references in Section 10 (f) to "order," "the unfair labor practice in question,"* and "the

* Petitioners argue (Br. 17) that the provision in Section 10 (f), for review in the circuit wherein "the unfair labor practice in question" was engaged in, does not indicate that only unfair labor practice cases were to be reviewed, because alternative venues for review are there also set forth—i. e., the circuit of residence or the Court of Appeals for the District of Columbia. But it is hardly to be supposed that Congress would provide that orders of the Board in unfair labor practice cases should be reviewable in forums not available for review of other types of Board orders (assuming there to be such). Rather the provision for review in the circuit where "the unfair labor practice in question was alleged to have been engaged in" shows that Congress had in mind only review in unfair labor practice cases. Otherwise it would have added to the last quoted words some such phraseology as "or in which the representation question arose."

pleading," and the absence of any mention of "facts certified" or "certification" or any other phrases drawn from Section 9 alone would compel the conclusion that Section 10 (f) was not intended to provide review of a proceeding like the instant, involving no "order," no unfair labor practice, and no complaint. The only authority which the Act confers upon the Board to issue an "order" is found in Section 10 (c). That the "order" reviewable under Section 10 (f) is this order and not a certification, even if a certification were assumed to be an order in the general sense, is indicated further by the careful use of terminology in Section 9 (d), where alone in the statute representation and unfair labor practice proceedings are mentioned in the same section. Congress there drew a clear distinction between "facts certified" and "certification" under Section 9, and "order" under Section 10.

B. THE BOARD'S CERTIFICATION IS NOT AN ORDER

Our discussion this far has assumed *arguendo* that the Board's certification is an order, although not an "order" within the particular meaning of Section 10 (f) or any other provision of the Act. We now show that the Board's certification is not an order at all and hence that Section 10 (f), even if it were not limited to unfair labor practice cases under Section 10, could not be applicable herein as contended by petitioners. The

holding of the court below was put upon this ground (R. 74). The Circuit Court of Appeals for the Third Circuit likewise so held in *United Employees Ass'n* v. *National Labor Relations Board*, 96 F. 2d 875, 876.[7] These decisions are in accord with those of this Court in analogous cases (*Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 562; *Shannahan* v. *United States*, 303 U. S. 596, 599; *United States* v. *Atlanta, B. & C. R. Co.*, 282 U. S. 522, 527–528; *United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299, 309–310), and, contrary to the claim of petitioners (Br. 45–49), do not conflict with, but are supported by, the principles discussed in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125.

The *Virginian Railway* case, *supra*, arose under the Railway Labor Act (c. 347, 44 Stat. 577), as amended (c. 691, 48 Stat. 1185), and particularly Section 2, ninth, thereof, which imposes a duty upon the employer to treat with the certified representative of the employees upon receipt of the certification of the National Mediation Board. In it the Court said (300 U. S. at 562):

> The National Mediation Board makes no order. The command which the decree of the court enforces is that of the statute, not

[7] In the *International Brotherhood* case, relied on by petitioners (Br. 31–33) the Circuit Court of Appeals for the Sixth Circuit said that a "certificate is not an order" (105 F. 2d 598, 601).

> of the Board. Its certificate that the Federation is the authorized representative of the employees is the ultimate finding of fact prerequisite to enforcement by the courts of the command of the statute. There is no contention that this finding is conclusive in the absence of a finding of the basic facts on which it rests—that is to say, the number of eligible voters, the number participating in the election and the choice of the majority of those who participate. Whether the certification, if made as to those facts, is conclusive, it is unnecessary now to determine.

Under the National Labor Relations Act, an employer's duty under Section 8 (5), that he not refuse to bargain with the representative of a majority of his employees in the appropriate unit, is not contingent upon the receipt or existence of a certification under Section 9 (c); the duty may be enforced only by a proceeding against the employer pursuant to Section 10; and such a proceeding may be instituted by the Board regardless of whether or not there has been a certification (Sections 10 and 8 (5)). See e. g., *Remington Rand* v. *National Labor Relations Board*, 94 F. 2d 862 (C. C. A. 2d), certiorari denied, 304 U. S. 576, 585; *Carlisle Lumber Co.* v. *National Labor Relations Board*, 94 F. 2d 138, certiorari denied, 304 U. S. 575; *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. 2d 678 (C. C. A. 6th),

certiorari denied, October 9, 1939. *A fortiori*, therefore, if the certification in the *Virginian Railway* case was not an order, the Board's certification in the instant case is not.

The proceeding herein was investigatory in character, as are all proceedings under Section 9 (c). The Board's certification fulfilled merely an advisory function (Cf. *Shannahan* v. *United States*, 303 U. S. 596, 599) and had no legal effect upon the rights of the employers or employees or labor organizations involved. The Act imposes duties only upon employers (Section 8), and if the employers herein desired not to recognize the I. L. W. U. as the exclusive representative, they could refuse in the same manner as they did prior to the Board's certification and at the risk of no penalty. They could be compelled only by court enforcement of an order made in a proceeding against them under Section 10. In any such case there would be a hearing (Section 10 (b)) with opportunity for interested persons and labor organizations to intervene pursuant to the Act (Section 10 (b)) and to the Board's Rules and Regulations (Series 2, Art. II, Sec. 19) and, if they were aggrieved by a final order, to secure a review under Section 10 (f) before such order could be enforced. The Board's findings in the certification proceeding would not be *res judicata* (Cf. *In the Matter of American-Hawaiian S. S. Co.*, 6 N. L. R. B. 678; *In the Matter of Fedders Mfg. Co.*, 7 N. L. R. B. 817), and even if the Board should refuse to recon-

sider matters fully investigated under Section 9 (c), such matters, including any questions as to the appropriate unit, would be a part of the record before the court for judicial review as provided in Section 9 (d).

For these reasons we submit that the Board's certification is not an order. It can be construed, at most, only as an announcement that the Board probably would entertain a charge under Section 10 against the employers if, after a request (See *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292), they refused to bargain exclusively with the certified representative, and that it would probably not proceed against them if they did so bargain. Cf. *United States* v. *Atlanta, B. & C. R. Co.*, 282 U. S. 522; *Shannahan* v. *United States*, 303 U. S. 596, 599. Since the Act imposes no penalties, it may not be said that such an announcement adds any compulsion to the employers' duty under Section 8 (5). Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. And, at least as regards the employers, even if the certification could be called an order, it would not be a "final order" as required by Section 10 (f), but concededly (Br. 44, 22–23) would fall within the category of nonreviewable orders discussed in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 129, 130–131, wherein "the order sought to be reviewed does not of itself adversely affect complainant but only affects his

rights adversely on the contingency of future administrative action."

Petitioners contend (Br. 45), however, that the instant case belongs with the third group of cases discussed in the opinion in the *Rochester* case (307 U. S. at 130, 135–143), wherein "the action sought to be reviewed does not forbid or compel conduct on the part of the person seeking review but is attacked because it does not forbid or compel conduct by a third person." The ground of this contention apparently is that the Board did not compel the employers to bargain with the representatives of the employers in individual employer units. But it has already been shown that a certification is without legal effect, and that only by a proceeding under Section 10 could the Board order the employers to bargain. Since the Board has made no order under Section 10, the instant case is clearly distinguishable from the decision in the *Rochester* case. The determination of the Commission there reviewed "necessarily and immediately carried direction of obedience to previously formulated mandatory orders" (307 U. S. at 144). In the absence of any such order by the administrative tribunal, its determination in regard to the particular status of a party under the statute is not reviewable except by suit in equity, and then only if the statute does not preclude such a suit

and if the conditions of equity jurisdiction can be met. *Shannahan* v. *United States*, 303 U. S. 596; *Shields* v. *Utah Idaho Cent. R. Co.*, 305 U. S. 177. Thus in the *Shannahan* case the Court held that the Interstate Commerce Commission's decision and certification that a carrier was not an interurban electric railway and hence that it was subject to the Railway Labor Act, was not a reviewable order under the Urgent Deficiencies Act. The *Shannahan* decision was not overruled by the decision in the *Rochester* case, which cites it with approval (307 U. S. at 130), and we submit that the principle upon which that decision was based is controlling here.

Petitioners contend (Br. 25–26, 40) that the Board's certification has adversely affected the property rights of employees to self-organization, has deprived petitioners of their status as bargaining representative, and has, in effect, put them "out of business" in regard to the Pacific Coast longshoremen. To support this contention they state (Br. 4, 23, 40) that the employers have entered into contracts with the I. L. W. U. as the exclusive representative of the longshoremen and have agreed to give preference of employment to members of that organization. But that is immaterial to the question whether the certification is an order or had any legal effect. For it is fallacious to conclude that because these events followed the Board's certification, they were compelled by it.

The employers might have taken the same action in the absence of any certification. Indeed, prior to the certification, as the Board found (R. 26), the employers (except in four ports) gave preference of employment to members of the I. L. W. U., the agreement of 1937 negotiated by the I. L. A., under which preference of employment was to be given its members (R. 14), having been taken over by the I. L. W. U. after the longshoremen had voted to change their allegiance to that organization (*supra*, p. 6).

C. SECTION 9 (D) PRECLUDES REVIEW OF THE BOARD'S CERTIFICATION

Thus far we have shown that Section 10 (f) is limited to the review of final orders issued in unfair labor practice cases under Section 10, and that, in any event, the Board's certification was not such an order or, indeed, an order at all. We now show that Section 9 (d), properly interpreted according to the affirmative intent of Congress, precludes a review herein by enacting, in effect, that certifications are reviewable only in connection with the review of orders under Section 10. Section 9 (d) provides:

> Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such

> certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

In thus making certifications reviewable in a single situation, and providing for their review in no other case, Congress intended that no other review of them should be permitted. This is the natural construction of the provision and its correctness is shown conclusively by the legislative history. Since we have treated the legislative history at length in our brief (pp. 25–32) in the *International Brotherhood* case, we will refer here only to such portions as are particularly in point in this case.

The Reports both of the Senate and House Committees interpret Section 9 (d) as precluding review of investigation proceedings except as there provided. The Senate Committee Report (S. Rept. No. 573, 74th Cong., 1st Sess., p. 14), after noting the requirement of Section 9 (c) that in any such proceeding a hearing must be held, declares:

> Section 9 (d) makes it absolutely clear that there shall be no right to court review anterior to the holding of an election. An election is the mere determination of a

> preliminary fact, and in itself has no substantial effect upon the rights of either employers or employees. * * * But if subsequently the Board makes an order predicated upon the election, such as an order to bargain collectively with elected representatives,* then the entire election procedure becomes part of the record upon which the order of the Board is based, and is fully reviewable by any aggrieved party in the Federal courts in the manner provided in section 10. And this review would include within its scope the action of the Board in determining the appropriate unit for purposes of the election. This provides a complete guarantee against arbitrary action by the Board.

The House Committee Report (H. Rept. No. 1147, 74th Cong., 1st Sess., p. 23) similarly states:

> As previously stated in this report, the efficacy of Public Resolution 44 has been substantially impaired by the provision for court review of election orders prior to the holding of the election. Section 9 (d) of the bill makes clear that there is to be no court review prior to the holding of the election, and provides an *exclusive*, complete, and adequate remedy whenever an order of the Board made pursuant to section

* Another type of Section 10 order based in part upon facts certified under Section 9 would be one directing the employer to cease and desist from bargaining with an organization other than the majority representative.

> 10 (c) is based in whole or in part upon facts certified following an election or other investigation pursuant to section 9 (c). The hearing required to be held in any such investigation provides an appropriate safeguard and opportunity to be heard. [Italics supplied.]

Petitioners contend (Br. 20–21) that these reports go to show that Congress was concerned only with prohibiting appeals prior to the holding of elections, and did not intend to foreclose review of certifications after elections. We agree that such appeals may have been foremost in the mind of Congress, because of the experience under Public Resolution 44.* But this is far from saying that Congress did not intend also to preclude review of certifications, and the reports construe Section 9 (d) as excluding all review of representation proceedings except as therein provided. Moreover, if the provision excludes review prior to elections it is exclusive in regard to any review; in the absence of any language warranting a distinction it cannot be construed as exclusive for one purpose and as not exclusive for another. Petitioners' in-

* The unsatisfactory experience under Public Resolution 44 (approved June 19, 1934, c. 677, 48 Stat. 1183), which, with Section 7 (a) of the National Industrial Recovery Act (Act of June 16, 1933, c. 90, 48 Stat. 195, 15 U. S. C., Secs. 701 *et seq.*), was the predecessor of the National Labor Relations Act, is discussed in the Committee Reports (H. Rept. 1147, 74th Cong., 1st Sess., pp. 6–7; S. Rept. 573, 74th Cong., 1st Sess., pp. 5–6) and in our brief (pp. 24–32) in the *International Brotherhood* case.

terpretation is illogical and, in addition, it is opposed by the statement of Senator Walsh, Chairman of the Senate Committee, made on the floor of the Senate (79 Cong. Rec. 7658), as follows:

> Mr. COUZENS. The Senator said that Resolution 44 was ineffective. Will he tell us before he concludes why Resolution 44 was ineffective?
>
> Mr. WALSH. It was ineffective, as I think I stated, because of appeals to the courts. In cases where attempts have been made to hold elections the claim has been made that the Board had no legal authority; the cases have been brought into court, and they are in the courts and undecided.
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> * * * * * *
>
> Mr. COUZENS. Would the passage of the pending bill remove the appeals to the courts?
>
> Mr. WALSH. Yes; it would because *it limits appeals.* It provides for review in the courts *only after* the election has been held and *the Board has ordered the employer to do something* predicated upon the results of the election. [Italics supplied.]

Further reason for rejecting petitioners' interpretation is that review of certifications would be subject to the same objection which was a reason for prohibiting review of proceedings prior to the holding of elections, which petitioners apparently admit that Congress did prohibit (Br. 20). This objection was that such review would result in de-

lays in preventing employers from engaging in unfair labor practices (H. Rept. 1147, 74th Cong., 1st Sess., pp. 6–7, 23; S. Rept. 573, 74th Cong., 1st Sess., pp. 5–6). If certifications were reviewable, it would be possible, just as in the case of directions of hearings or elections, for employers or competing labor organizations or even, perhaps, for individual employees, by filing appeals and applications for stays, to prevent the Board from proceeding under Section 10 pending final decision as to the validity of the certification.[10] And by or before such final decision it might well be that, due to the employer's continued violations of the Act or some other reason, the certified representative would have lost its majority or that a further investigation under Section 9 would be required. Thus the collective bargaining provision of the Act (Section 8 (5)) might be rendered inoperative.

We submit, therefore, that Congress, in precluding a review of certifications except as specified in Section 9 (d), wisely acted upon " 'the policy that the greater good is sometimes served by making certain classes of decisions final and ending litigation, even though in a particular case the individual is prevented by review from correcting some error which has injured him'." *Crane* v. *Hahlo*, 258 U. S. 142, 148.

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[10] During the year covered by the Board's most recent annual report (June 1937–June 1938), a total of 342 certifications were issued. *Third Annual Report of the National Labor Relations Board*, p. 40.

As a reason for construing Section 9 (d) not to bar review of certifications, although construed to bar review of proceedings prior to the holding of elections, petitioners urge (Br. 21–22), that the Board's determination of the appropriate bargaining unit is judicial in nature whereas, they assert (Br. 21), "No such exercise of discretion or determination of policy is involved in the conduct of an election." The fact is, however, that before holding elections the Board does and must decide what constitutes the appropriate unit. Otherwise, the election would not be accurate since the unit fixes the eligibility to vote. It cannot be asserted that Congress did not anticipate the necessity of determining the unit prior to the election; the Senate Committee Report speaks of "the action of the Board in determining the appropriate unit *for purposes of the election*" (S. Rept. No. 573, 74th Cong., 1st Sess., p. 14). [Italics supplied.]

Finally, petitioners urge (Br. 22–23) that Section 9 (d) was intended to be applicable "primarily" to employers, and that Congress did not intend it to limit review by labor organizations, especially since a review by way of a proceeding under Section 10 might not be open to the latter. A similar contention is answered in our brief (pp. 31–32) in the *International Brotherhood* case. We there point out that delays occasioned by appeals in representation proceedings would be objectionable regardless of who took the appeals and that Congress meant to preclude those brought by

labor organizations or individual employees as well as those brought by employers.[11] We also stated that whatever may have been the dominant motive of Congress in enacting Section 9 (d), the Court cannot interpret it differently according to whether an employer or a labor organization seeks review. If recent developments in the labor movement, or any other considerations, are persuasive that certifications should be reviewable at the instance of labor organizations, it is for Congress to reconsider the subject, as it is now doing, and prescribe the method and terms to govern such review. There is now pending before Congress a bill (S. 1000, 76th Cong., 1st Sess.) sponsored by the American Federation of Labor which would amend Section 9 (d) to provide that "In any proceeding under Section 9 which is not incidental to a proceeding under Section 10, certification or denial thereof * * * shall constitute a final order and shall be reviewable upon the petition of any labor organization aggrieved * * *"

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[11] The Senate Committte Report, in the portion quoted, *supra*, pp. 32–33, stated, as a reason for the exclusive interpretation of Section 9 (d), that "An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the rights of *either employers or employees*." (Italics supplied.) That Congress must have contemplated the possibility of appeals by labor organizations is further indicated by the statement of the House Committee (H. Rept. No. 1147, 74th Cong., 1st Sess., p. 22) that questions of representation would "ordinarily arise as between two or more bona fide organizations competing to represent the employees."

D. THE FOREGOING INTERPRETATIONS OF SECTIONS 10 (F) AND 9 (D) DO NOT ENDANGER THE CONSTITUTIONALITY OF THE ACT

Petitioners contend in their brief (pp. 24–29), although they did not do so in their petition for certiorari, that the constitutionality of the Act would be endangered if the Board's interpretation of Section 10 (f) were correct, and that, therefore, if the Court finds the terms of Section 10 (f) to be ambiguous, it should reject the Board's interpretation. Their argument is that the Board's certification of the I. L. W. U. was a judicial determination which adversely affected the property right of petitioners to represent the longshoremen in collective bargaining, that the due process clause of the Fifth Amendment requires that there be a judicial review of such a determination, and that, if the Act were construed to preclude such a review, it would be invalid as an unconstitutional delegation of judicial power to the Board.

Even if it were assumed that Congress could not validly preclude all judicial review of the Board's certification, Congress plainly was not required by the Constitution to confer jurisdiction upon the Court of Appeals for the District of Columbia or any other particular tribunal. Cf. *Shannahan* v. *United States*, 303 U. S. 596, and *Shields* v. *Utah Idaho Cent. R. Co.*, 305 U. S. 177. Accordingly, the only possible application which petitioners' claim could have would be in regard to our contention (*supra*, pp. 31–38) that Section 9 (d) should be

construed to exclude review by any court except as therein provided. It has no application to the validity of our interpretation of Section 10 (f), which is the provision relied on by petitioners.

However, it has already been shown (*supra*, pp. 24–31) that the Board's certification is not an order and did not forbid or compel any action on the part either of the employers or petitioners. Consequently, the certification cannot be said to have deprived petitioners of any property or other rights. Moreover, the alleged right asserted by petitioners to bargain for longshoremen in particular units is a statutory as distinct from a constitutional right. Cf. *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515; *Blankenship* v. *Kurfman*, 96 F. 2d 450, 454 (C. C. A. 7th). Hence, even if it were assumed that the Board's certification had an adverse effect upon rights of petitioners, the Fifth Amendment would not require that there be opportunity for a judicial review. *Reetz* v. *Michigan*, 188 U. S. 505, 507; *United States* v. *Ju Toy*, 198 U. S. 253; *Passavant* v. *United States*, 148 U. S. 214, 219, 222. See also *United States* v. *Babcock*, 250 U. S. 328; *Crane* v. *Hahlo*, 258 U. S. 142; *Work* v. *Rives*, 267 U. S. 175; *First Moon* v. *White Tail*, 270 U. S. 243; *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551; *Butte, Anaconda & Pacific Ry. Co.* v. *United States*, 290 U. S. 127, and other cases collected in the concurring opinion in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 77–81.

The fact that the Board's authority to issue certifications under Section 9 (c) or to issue complaints under Section 10 is discretionary rather than mandatory is an additional reason why the Constitution does not require opportunity for judicial review. Cf. *Dismuke* v. *United States*, 297 U. S. 167, 172; *Newport Electric Corp.* v. *Federal Power Commission*, 97 F. (2d) 580, 582 (C. C. A. 2d). The decisions relied on by petitioners (Br. 27)[12] are not in point since, so far as they are relevant at all, they relate merely to the scope of judicial review of orders which affect property interests held to be protected by the Constitution. Compare *Acker* v. *United States*, 298 U. S. 426, 434.

Petitioners' contention (Br. 27) that if Congress precluded review of certifications it unconstitutionally delegated judicial power to the Board, is answered by the fact that Section 9 (d) provides for review whenever the Board issues an order based upon facts certified. In the absence of such an order, the Board did not exercise any such judicial function as could not be made conclusive. See *Shields v. Utah Idaho R. Co.*, 305 U. S. 177, 180; *Pennsylvania Railroad Co.* v. *Labor Board*, 261 U. S. 72.

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[12] *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285; *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287; *Crowell* v. *Benson*, 285 U. S. 22; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38.

II

THE ACT AUTHORIZED THE BOARD TO DECIDE THAT THE APPROPRIATE UNIT FOR COLLECTIVE BARGAINING COMPRISED THE LONGSHOREMEN EMPLOYED BY THE MEMBERS OF THE EMPLOYERS' ASSOCIATIONS

Petitioners argue the merits only briefly (Br. 9–12) and the validity of the Board's certification was not passed upon by the court below, since it held that it was without jurisdiction to review the proceeding. However, while we think that this holding should be sustained on the grounds already stated (*supra*, pp. 17–41), if the Court holds to the contrary, it may care to consider the merits, and, if it does so, we submit that it should affirm the Board's certification.

Petitioners have at no time challenged the validity of the Board's findings of fact, but contend that the Board has no power under the Act to decide that an appropriate bargaining unit may include the employees of more than a single employer (Br. 5, 48), which is purely a question of statutory construction. This contention was rejected by the Board (R. 28–29, 7 N. L. R. B. 1002, 1024–1025) and is contrary to the decision of the Circuit Court of Appeals for the Eighth Circuit in *National Labor Relations Board* v. *Lund*, 103 F. (2d) 815.

The decision of the Board that the Act authorized it to determine that the appropriate unit consisted of the longshoremen employed by the mem-

bers of the employers' associations was based upon and is valid under the provisions of Section 9 (b), taken in conjunction with the statutory definitions contained in Section 2 (1) and (2). Section 9 (b) provides:

> The Board shall decide in each case whether, in order to insure to employees [13] the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the *employer* unit, craft unit, plant unit, or subdivision thereof. [Italics supplied.]

The term "employer," as used in the Act, includes "any person acting in the interest of an employer" (Section 2 (2)), and the term "person" is defined to include "one or more * * * associations" (Section 2 (1)). It appears, therefore, that the Board had express power to find that the appropriate "employer unit" in this case was coextensive with the employers' associations which since 1934 had acted in behalf of their members in bargaining with the longshoremen (*supra*, pp. 5–6).

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[13] The Act provides that the term "employee," except where otherwise explicitly stated, "shall not be limited to the employees of a particular employer" (Section 2 (3)). The report of the Senate Committee (S. Rept. No. 573, 74th Cong., 1st Sess., p. 6) indicates that one reason for this provision was that some labor organizations bargained with associations of employers.

If, contrary to the literal meaning of the foregoing provisions, the Board's power were limited in the manner contended by petitioners, the Board could not recognize the propriety of established multiple-employer units which had evolved in bargaining between unions and groups or associations of employers in many important industries,[14] as Congress undoubtedly knew (footnote 13, *supra*, p. 43). Such a consequence would, in such case, be inconsistent with the provision of Section 9 (b) that the appropriate unit designated by the Board shall insure to employees "the full benefit of their right to self-organization" and shall effectuate the

[14] Some 37 trades or industries in which employers' associations engage in collective bargaining are listed in United States Department of Labor, Bureau of Labor Statistics, *Collective Bargaining with Employers' Associations*, Monthly Labor Review, 1939, Vol. 49, No. 2, p. 310. Among the most noteworthy examples, in addition to coal mining (footnote 15, *infra*, p. 46), are the clothing, building, printing, glass, transportation, and maritime industries. See Zaretz, C. E., *The Amalgamated Clothing Workers of America*, 1934, pp. 174–219; United States Department of Labor, Bureau of Labor Statistics, *Union-Management Relations, Women's Clothing*, Monthly Labor Review, 1936, Vol. 43, No. 1, pp. 24–33; United States Department of Labor, Bureau of Labor Statistics, Bulletin 481, 1928, pp. 83–103; United States Department of Labor, Bureau of Labor Statistics, *Collective Bargaining in the Glass Industry*, Monthly Labor Review, 1936, Vol. 42, No. 5, p. 1204; *Third Annual Report of the National Mediation Board*, 1937, pp. 2–3; United States Department of Labor, Bureau of Labor Statistics, *Industrial Relations in 1938*, Monthly Labor Review, 1939, Vol. 48, No. 3, p. 506.

policies of the Act, which are to protect commerce by eliminating the causes of industrial strife (Section 1). The Board would be called upon to issue certifications and orders in conflict with existing practices of collective bargaining which are satisfactory to the employers and to the majority of the employees involved. Minority groups or individuals would seek to have the Board order employers to cease giving effect to existing beneficial contracts and not to renew them. Uniformity and stability in employment relations would give way to uncertainty and strikes resulting in severe obstructions to commerce. The possibility of a widespread strike by the Pacific Coast longshoremen in particular, may not be overlooked in view of the 1934 strike called by the members of the I. L. A. partly for the purpose of obtaining a coast-wide contract (*supra*, pp. 4–5).

Petitioners' contention as to the limited scope of the Board's authority under Section 9 (b) is opposed further by the legislative history, which indicates that Congress did not intend to restrict the Board in the manner asserted. The bill as originally introduced and as passed by the Senate authorized the Board to determine that the appropriate unit was the "employer unit, craft unit, plant unit, or other unit" (S. 1958, 74th Cong., 1st Sess., Section 9 (b)). On the floor of the House of Representatives this provision was amended by

striking out the words "or other unit" and adding "*Provided that* no unit shall include the employees of more than one employer" (79 Cong. Rec. 9728). The addition of this proviso was opposed by Representative Connery, sponsor of the bill in the House and Chairman of the House committee, as follows (79 Cong. Rec. 9728):

> According to the amendment offered by the gentleman from Georgia, the United Mine Workers would have to deal with each separate one [coal operator], and they could not unite for collective bargaining as a unit in the coal industry.[15]

In view of this pertinent objection, the subsequent action of Congress in adopting the Conference Report of the House and Senate Committee (79 Cong. Rec. 10259, 10298) which omitted both the proviso of the House amendment and the words "or other unit" which had been in the bill as it

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[15] The terms and conditions of employment in most of the bituminous coal industry were and are covered by basic agreements between the United Mine Workers and associations of coal operators. See United States Department of Labor, Bureau of Labor Statistics, *Bituminous Coal Stoppage 1939*, Monthly Labor Review, 1939, Vol. 49, pp. 691–703. See also *Matter of Alston Coal Co.*, 13 N. L. R. B., No. 77; Dennison, Hotchkiss, and Willits, *Labor Relations in the Anthracite Industry* (annexed to the Report of the United States Coal Commission, 1929, pp. 96–100); United States Department of Labor, Bureau of Labor Statistics, *The 1936 Anthracite Agreement*, Monthly Labor Review, 1936, Vol. 42, pp. 1581–1582.

passed the Senate, may well indicate an intent to permit the Board to decide upon units larger than the single employer, at least where, as here and in the coal and other industries (footnote 14, *supra*, p. 44), such multiple-employer units accord with existing bargaining practice. This inference is consistent with the statement of the managers on the part of the House (79 Cong. Rec. 10299) and of the Chairman of the Senate Committee (79 Cong. Rec. 10259) that the proviso stricken in conference "was subject to some misconstructions."[16]

Even if it were possible to uphold petitioners' contention, we submit that such a decision would be undesirable. Impartial studies of labor relations both in this country and abroad, especially in Great Britain and Sweden, suggest that there are many advantages which may be gained from collective

[16] The full statement, insofar as pertinent herein, reads as follows:

"The amendment also added a proviso designed to limit the otherwise broad connotation that might be put upon the phrase 'or other unit.' The proviso, however, was subject to some misconstructions, and the conferees have agreed that the simplest way to deal with the matter is to strike out the undefined phrase 'other unit.' It was also agreed to insert after 'plant unit' the phrase 'or subdivision thereof.' This was done because the National Labor Relations Board has frequently had occasion to order an election in a unit not as broad as 'employer unit', yet not necessarily coincident with the phrases 'craft unit' or 'plant unit'; for example, the 'production and maintenance employees' of a given plant."

bargaining on a scale broader than with single employers.[17] These advantages would appear to be especially clear in situations such as that presented herein where the employers function through associations and where the nature of the employment is such that the employees, dispatched from jointly operated hiring halls, may work one day for one employer and the next day for another.[18] The Act ought not to be construed to interfere with the continuation and further development of multiple-employer units in these and similar instances.

Petitioners assert (Br. 9) that the American Federation of Labor is seriously disturbed over the "tremendous implications" of this case. They cite (Br. 9–11) several hypothetical instances in an endeavor to impress the Court that the Board's discretion might "run riot" if multiple-employer units were permitted. To the extent that this argument requires answer, it may be noted, however, that in other cases[19] labor organi-

[17] Commission on Industrial Relations, *Final Report and Testimony*, 1916, Vol. I, pp. 119–120; *Report of the United States Coal Commission*, 1925, pp. 275–276; United States *Report of the Commission on Industrial Relations in Great Britain and Sweden*, 1938. See also Riesenfeld, S. A., *Recent Developments of French Labor Law* (1939), 23 Minnesota Law Review, 407, 430.

[18] This turn-over of employment might even involve a variation of collective bargaining representatives from day to day, if the employees of each employer were considered to be separate units.

[19] *Matter of F. E. Booth & Co.*, 10 N. L. R. B. 1491; *Matter of Hyman-Michaels Co.*, 11 N. L. R. B. 796. See also

zations affiliated with the American Federation of Labor have urged the Board to decide that such units were appropriate and that, indeed, in the case of the Pacific coast longshoremen, the I. L. A. went on strike partly for the purpose of securing a coast-wide agreement (*supra*, p. 5). Moreover, petitioners are able to cite no case in which the Board has abused its discretion in finding such a unit appropriate. Except in cases involving companies affiliated by common ownership or control,[20] the Board has never decided in favor of multiple employer bargaining unless there had been, as here, a previous history of actual dealing upon that basis and unless adequate machinery for it already existed.[21] In the absence of these conditions the Board has rejected contentions that multiple-employer units were appropriate. E. g. *Matter of Aluminum Line*, 8 N. L. R. B. 1325; *Matter of F. E. Booth & Co.*, 10 N. L. R. B. 1491

Matter of C. A. Lund Co., 6 N. L. R. B. 423, order enforced *National Labor Relations Board* v. *Lund*, 103 F. (2d) 815 (C. C. A. 8); *Matter of Union Premier Food Stores, Inc.*, 10 N. L. R. B. 370, 11 N. L. R. B. 270.

[20] E. g., *Matter of C. A. Lund Co.*, 6 N. L. R. B. 423, order enforced *National Labor Relations Board* v. *Lund*, 103 F. (2d) 815 (C. C. A. 8); *Matter of Art Crayon Co.*, 7 N. L. R. B. 102; *Matter of Mackay Radio Corp.*, 5 N. L. R. B. 657; *Matter of Postal Telegraph-Cable Corp.*, 9 N. L. R. B. 1060.

[21] See *Matter of Mobile Steamship Association*, 8 N. L. R. B. 1297; *Matter of Admiar Rubber Co.*, 9 N. L. R. B. 407; *Matter of Monon Stone Co.*, 10 N. L. R. B. 64; *Matter of Hyman-Michaels Co.*, 11 N. L. R. B. 796; *Matter of Alston Coal Co.*, 13 N. L. R. B., No. 77.

For the above reasons, and since it is not contended that the Board's determination herein was arbitrary or in any respect unreasonable, as it clearly was not, we submit that if the Court holds that the Act authorizes a review, it should sustain the certification.

CONCLUSION

It is submitted that the decision of the court below dismissing the petition for review for lack of jurisdiction was correct and should be affirmed. In the event that the Act is held to grant jurisdiction to review the proceedings before the Board, it is submitted that the Court, if it passes upon them, should sustain the decision and certification of representatives issued by the Board.

Respectfully submitted.

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NOVEMBER 1939.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. Supp. IV, Sec. 152, 159, 160) are as follows:

SEC. 2. When used in this Act—

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain [1] such representatives.

[1] So in original.

(d) Whenever an order of the Board made pursuant to section 10 (c), is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such com-

plaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging

in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing,

modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing,

modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101–115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

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SUPREME COURT OF THE UNITED STATES.

No. 70.—October Term, 1939.

American Federation of Labor, International Longshoremen's Association and Pacific Coast District International Longshoremen's Association No. 38, Petitioners,
vs.
National Labor Relations Board.

On Writ of Certiorari to the United States Circuit Court of Appeals for the District of Columbia.

[January 2, 1940.]

Mr. Justice Stone delivered the opinion of the Court.

The question decisive of this case is whether a certification by the National Labor Relations Board under § 9(c) of the Wagner Act, 49 Stat. 449, 453, 29 U. S. C., Supp. IV, §§ 151-166, that a particular labor organization of longshore workers is the collective bargaining representative of the employees in a designated unit, composed of numerous employers of longshore workers at Pacific Coast ports, is reviewable by the Court of Appeals for the District of Columbia by the procedure set up in § 10(f) of the Act.

Petitioners, International Longshoremen's Association, and its affiliate, Pacific Coast District International Longshoremen's Association No. 38, are labor organizations, both affiliated with the petitioner, American Federation of Labor (A. F. of L.). In January, 1938, the International Longshoremen's & Warehousemen's Union, District No. 1, a labor organization affiliated with the Congress of Industrial Organization (C.I.O.) petitioned the Board for an investigation concerning the representation of longshoremen on the Pacific Coast, and that the Board certify the name of the appropriate representative for collective bargaining as provided in § 9(c) of the Wagner Act.

The Board directed an investigation with appropriate hearings, and a consolidation of the proceeding for purposes of hearing with two other proceedings already initiated by locals of the Long-

shoremen's Union. Petitioners were made parties to the consolidated proceedings and participated in the hearings, at the conclusion of which the Board made its findings of fact and of law and certified that the workers who do longshore work in the Pacific Coast ports for the employers which are members of five designated employer associations of Pacific Coast shipowners or of waterfront employers, constitute a unit appropriate for the purposes of collective bargaining within the meaning of § 9(b) of the Act. It also certified that the C. I. O. affiliate, Longshoremen's Union, District No. 1, is the exclusive bargaining representative of all the workers in such unit within the meaning of the Act. *In the Matter of Shipowners' Association of the Pacific Coast, et al.*, 7 N. L. R. B. 1002.

The effect of the certification, as petitioner alleges, is the inclusion in a single unit, for bargaining purposes, of all of the longshore employees of the members of the employer associations doing business at the west coast ports of the United States, and to designate the C.I.O. affiliate as their bargaining representative so that in the case of some particular employers, their workers who are not organized or represented by the C.I.O. affiliate have been deprived of opportunity to secure bargaining representatives of their own choice. Although the petitioners who are affiliated with the A. F. of L. assert that they have in fact been selected as bargaining representatives by a majority of the employees of their respective employers, petitioners allege that they have nevertheless been prevented from acting in that capacity by the Board's designation of the C. I. O. affiliate as the exclusive representative of such employees.

The present suit was begun by petition to the Court of Appeals of the District of Columbia in which the petitioners set forth, in addition to the facts already detailed, that they were aggrieved by the "decision and order of certification of the Board" in that the certificate is contrary to fact and to law; that the Wagner Act does not contemplate or authorize "the designation by the Board of an employee unit constituting all the employees of different employers in different and distant geographical districts of the United States." The petition prayed that the "order of certification" be set aside, in so far as it attempts to designate a single exclusive bargaining representative for longshore employees of many employers on the Pacific Coast and denies to a majority of the longshore employees of a single employer the right to select one of the petitioners as their exclusive bargaining representative.

The Court of Appeals dismissed the petition as not within the jurisdiction to review orders of the Board conferred upon it by § 10 of the Wagner Act. 103 F. (2d) 933. We granted certiorari October 9, 1939, because of the importance of the question presented and to resolve an alleged conflict of the decision below with that of the Court of Appeals for the Sixth Circuit, in *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 105 F. (2d) 598.

The Court of Appeals for the District of Columbia, like the several circuit courts of appeals, is without the jurisdiction over original suits conferred on district courts by § 24 of the Judicial Code, as amended. 28 U. S. C., § 41. Such jurisdiction as it has, to review directly the action of administrative agencies, is specially conferred by legislation relating specifically to the determinations of such agencies made subject to review, and prescribing the manner and extent of the review. Here, the provisions of the Wagner Act, § 10(f), which gives a right of review to "any person aggrieved by a final order of the Board", determines the nature and scope of the review by the court of appeals.

The single issue which we are now called on to decide is whether the certification by the Board is an "order" which, by related provisions of the statute, is made reviewable upon petition to the Court of Appeals of the District or in an appropriate case to a circuit court of appeals. The question is distinct from another much argued at the Bar, whether petitioners are precluded by the provisions of the Wagner Act from maintaining an independent suit in a district court to set aside the Board's action because contrary to the statute, and because it inflicts on petitioners an actionable injury otherwise irreparable.

By the provisions of the Wagner Act the Board is given two principal functions to perform. One, defined by § 9, which as enacted is headed "REPRESENTATIVES AND ELECTIONS", is the certification, after appropriate investigation and hearing, of the name or names of representatives, for collective bargaining, of an appropriate unit of employees. The other, defined by § 10, which as enacted is headed "PREVENTION OF UNFAIR LABOR PRACTICES", is the prevention by the Board's order after hearing and by a further appropriate proceeding in court, of the unfair labor practices enumerated in § 8. One of the outlawed practices is the refusal of an employer to bargain with the representative of his employees. § 8(5).

Certification involves, under § 9(b), decision by the Board whether "the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof", and the ascertainment by the Board under § 9(c) of the bargaining representative who, under § 9(a) must be "designated or selected . . . by the majority of the employees in the unit appropriate for such [bargaining] purposes". The Board is authorized by § 9(c) "whenever a question affecting commerce arises concerning the representation of employees" to investigate "such controversy" and to certify the names of the appropriate bargaining representatives. In conducting the investigation it is required to provide for appropriate hearing upon due notice "and may take a secret ballot of employees, or utilize any other suitable method" of ascertaining such representatives. By § 9(d) whenever an order of the Board is made pursuant to § 10(c) directing any person to cease an unfair labor practice and there is a petition for enforcement or review of the order by a court, the Board's "certification and the record of such investigation" is to be included in the transcript of the entire record required to be filed under § 10(e) or (f), and the decree of the court enforcing, modifying or setting aside the order of the Board is to be made and entered upon the pleadings, testimony and proceedings set forth in the transcript.

It is to be noted that § 9, which is complete in itself, makes no provision, in terms, for review of a certification by the Board and authorizes no use of the certification or of the record in a certification proceeding, except in the single case where there is a petition for enforcement or review of an order restraining an unfair labor practice as authorized by § 10(c). In that event the record in the certification proceeding is included in the record brought up on review of the Board's order restraining an unfair labor practice. It then becomes a part of the record upon which the decree of the reviewing court is to be based.

All other provisions for review of any action of the Board are found in § 10 which as its heading indicates relates to the prevention of unfair labor practices. Nowhere in this section is there mention of investigations or certifications authorized and defined by § 9. Section 10(a) authorizes the Board "to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce". Section 10(b) prescribes the procedure of the Board when any person is charged with engaging in

any unfair labor practice, and requires that the person so charged shall be served with a complaint and notice of hearing by the Board with opportunity to file an answer and be heard. Section 10(c) directs the Board, if it is of opinion, as the result of the proceedings before it, that any person named in the complaint has engaged in an unfair labor practice "to issue" "an order" directing that person to cease the practice and commanding appropriate affirmative action. If the Board is of opinion that there has been no unfair labor practice it is directed "to issue" "an order" dismissing the complaint. Section 10(e) authorizes a petition to the appropriate federal court of appeals by the Board for the enforcement of its order prohibiting an unfair labor practice.

This brings us to the provisions for review of action taken by the Board in § 10(f) which is controlling in the present proceeding. That subdivision[1] appears as an integral part of § 10. All the other subdivisions relate exclusively to proceedings for the prevention of unfair labor practices. Both they and subdivision (f) are silent as to the proceedings or certifications authorized by § 9. Section 10(f), providing for review, speaks only of a "final order of the Board". It gives a right to review to persons aggrieved by a final order upon petition to a court of appeals in the circuit "wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia". It directs that the order shall be reviewed on the entire record before the Board "including the pleadings and testimony" upon which the order complained of was entered, although no complaint or other pleading is mentioned by § 9 relating to representation

[1] "(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive."

proceedings and certificates. Subdivision (f) provides that upon petition for review by an aggrieved person "the court shall proceed in the same manner as in the case of an application by the Board under subdivision (e)", and it is given the same jurisdiction "to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." See, *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, 369.

In analyzing the provisions of the statute in order to ascertain its true meaning, we attribute little importance to the fact that the certification does not itself command action. Administrative determinations which are not commands may for all practical purposes determine rights as effectively as the judgment of a court, and may be reexamined by courts under particular statutes providing for the review of "orders". See *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125, 130, 135 *et seq.*; *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156. We must look rather to the language of the statute, read in the light of its purpose and its legislative history, to ascertain whether the "order" for which the review in court is provided, is contrasted with forms of administrative action differently described as a purposeful means of excluding them from the review provisions.

Here it is evident that the entire structure of the Act emphasizes, for purposes of review, the distinction between an "order" of the Board restraining an unfair labor practice and a certification in representation proceedings. The one authorized by § 10 may be reviewed by the court on petition of the Board for enforcement of the order, or of a person aggrieved, in conformity to the procedure laid down in § 10, which says nothing of certifications. The other, authorized by § 9, is nowhere spoken of as an order, and no procedure is prescribed for its review apart from an order prohibiting an unfair labor practice. The exclusion of representation proceedings from the review secured by the provisions of § 10(f) is emphasized by the clauses of § 9(d), which provide for certification by the Board of a record of a representation proceeding only in the case when there is a petition for review of an order of the Board restraining an unfair labor practice. The statute on its face thus indicates a purpose to limit the review afforded by § 10

to orders of the Board prohibiting unfair labor practices, a purpose and a construction which its legislative history confirms.

Upon the introduction of the bill which was enacted as the Wagner Act, Congress had pointedly brought to its attention the experience under Public Resolution 44 of June 19, 1934, 48 Stat. 1183. That resolution authorized the National Labor Relations Board, predecessor of respondent, "to order and conduct elections" by employees of any employer to determine who were their representatives for bargaining purposes. Section 2 provided that any order of the Board should be reviewed in the same manner as orders of the Federal Trade Commission under the Federal Trade Commission Act. The reports of the Congressional committees upon the bill which became the Wagner Act refer to the long delays in the procedure prescribed by Resolution 44, resulting from applications to the federal appellate courts for review of orders for elections.[2] And in considering the provisions of § 9(d) the committee reports were emphatic in their declaration that the provisions of the bill for court review did not extend to proceedings under § 9 except as incidental to review of an order restraining an unfair labor practice under § 10.[3] The bill was similarly explained on the

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[2] "WEAKNESSES IN EXISTING LAW. . . . (6) *Obstacles to elections.*—Under Public Resolution 44, any attempt by the Government to conduct an election of representatives may be contested *ab initio* in the courts, although such election is in reality merely a preliminary determination of fact. This means that the Government can be delayed indefinitely before it takes the first step toward industrial peace. After almost a year not a single case, in which a company has chosen to contest an election order of the Board, has reached decision in any circuit court of appeals." Sen. Rep. No. 573, Committee on Education and Labor, 74th Cong., 1st Sess., pp. 5, 6.

After referring to the procedure for review under Public Resolution 44, the House Committee declared: "The weakness of this procedure is that under the provision for review of election orders employers have a means of holding up the election for months by an application to the circuit court of appeals. . . . At the present time 10 cases for review of the Board's election orders are pending in circuit courts of appeals. Only three have been argued and none have been decided." House Rep., No 1147, Committee on Labor, 74th Cong., 1st Sess., p. 6.

[3] "There is no more reason for court review prior to an election than for court review prior to a hearing. But if subsequently the Board makes an order predicated upon the election, such as an order to bargain collectively with elected representatives, then the entire election procedure becomes part of the record upon which the order of the Board is based, and is fully reviewable by an aggrieved party in the Federal courts in the manner provided in section 10. And this review would include within its scope the action of the Board in determining the appropriate unit for purposes of the election. This provides a complete guarantee against arbitrary action by the Board." Sen. Rep. 573, Committee on Education and Labor, 74th Cong., 1st Sess., p. 14.

"As previously stated in this report, the efficacy of Public Resolution 44 has been substantially impaired by the provision for court review of election orders prior to the holding of the election. Section 9(d) of the bill makes clear that

Senate floor by the committee chairman who declared: "It provides for review in the courts only after the election has been held and the Board has ordered the employer to do something predicated upon the results of an election." 79 Cong. Rec., 7658. The conclusion is unavoidable that Congress, as the result of a deliberate choice of conflicting policies, has excluded representation certifications of the Board from the review by federal appellate courts authorized by the Wagner Act except in the circumstances specified in § 9(d).

An argument, much pressed upon us, is, in effect, that Congress was mistaken in its judgment that the hearing before the Board in proceedings under § 9(c), with review only when an order is made under § 10(c) directing the employer to do something "provides an appropriate safeguard and opportunity to be heard", House Rep., p. 23, and that "this provides a complete guarantee against arbitrary action by the Board," Sen. Rep., p. 14. It seems to be thought that this failure to provide for a court review is productive of peculiar hardships, which were perhaps not foreseen in cases where the interests of rival unions are affected.[4] But these are arguments to be addressed to Congress and not the courts. The argument too that Congress has infringed due process by withholding from federal appellate courts a jurisdiction which they never possessed is similarly without force. *Shanahan* v. *United States*, 303 U. S. 596; see *In re National Labor Relations Board*, 304 U. S. 486, 495.

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there is to be no court review prior to the holding of the election, and provides an exclusive, complete, and adequate remedy whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an election or other investigation pursuant to section 9(c). The hearing required to be held in any such investigation provides an appropriate safeguard and opportunity to be heard. Since the certification and the record of the investigation are required to be included in the transcript of the entire record filed pursuant to section 10(e) or (f), the Board's actions and determinations of fact and law in regard thereto will be subject to the same court review as is provided for its other determinations under sections 10(b) and 10(c)." House Rep., No. 1147, Committee on Labor, 74th Cong., 1st Sess., p. 23.

[4] Congress apparently recognized that representation proceedings under § 9(c) might involve rival unions. The House Committee said: "Section 9(c) makes provisions for elections to be conducted by the Board or its agents or agencies to ascertain the representatives of employees. The question will ordinarily arise as between two or more bona fide organizations competing to represent the employees, but the authority granted here is broad enough to take in the not infrequent case where only one such organized group is pressing for recognition, and its claim of representation is challenged." H. Rep. No. 1147, Committee on Labor, 74th Cong., 1st Sess., p. 22.

The Board argues that the provisions of the Wagner Act, particularly § 9(d), have foreclosed review of its challenged action by independent suit in the district court, such as was allowed under other acts providing for a limited court review in *Shields* v. *Utah Idaho Central Railroad Co.*, 305 U. S. 177, and in *Utah Fuel Co.* v. *National Bituminous Coal Commission*, 306 U. S. 56; cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. But that question is not presented for decision by the record before us. Its answer involves a determination whether the Wagner Act, in so far as it has given legally enforceable rights, has deprived the district courts of some portion of their original jurisdiction conferred by § 24 of the Judicial Code. It can be appropriately answered only upon a showing in such a suit that unlawful action of the Board has inflicted an injury on the petitioners for which the law, apart from the review provisions of the Wagner Act, affords a remedy. This question can be properly and adequately considered only when it is brought to us for review upon a suitable record.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.